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## MAJOR COURT DECISIONS, 2007

### **Fox Television Stations v. FCC, 489 F.3d 444 (2d Cir. 2007)**

*Issue:* Whether the Federal Communication Commission's ("FCC") policy change concerning "fleeting expletives," which made Fox Televisions Stations, Inc. ("Fox") liable for two broadcasts deemed indecent under the new policy, was an arbitrary and capricious change under the Administrative Procedure Act.

*Holding:* The United States Court of Appeals for the Second Circuit held that the FCC's new policy on "fleeting expletives" was arbitrary and capricious under the Administrative Procedure Act, and thus void. Specifically, the Second Circuit found that the new policy was a "significant departure" from the previous policy, and that the FCC had failed to provide a reasonable explanation for this departure from established practices. The court vacated the FCC's order and remanded the case to the FCC for further proceedings consistent with the court's order.

*History:* Congress has authorized the FCC to impose a forfeiture penalty on any person that broadcasts obscene, indecent, or profane speech over the airwaves in the United States. *See* 47 U.S.C. § 503(b)(1)(D). However, the Administrative Procedure Act allows courts to set aside any agency's decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The FCC first tested its forfeiture penalty for the broadcast of indecent speech in 1975, when it ruled that Pacifica Foundation's broadcast of George Carlin's "Filthy Words" monologue was indecent and consequently sanctioned Pacifica with forfeiture. Pacifica Foundation appealed the ruling to the Court of Appeals for the D.C. Circuit, which invalidated the decision as too vague and overbroad. The FCC subsequently appealed to the Supreme Court, which ultimately found, in a plurality opinion, that the FCC's regulation of indecent material was not a violation of the First Amendment; however, the Court narrowed its ruling to the specific facts of the case. *See FCC v. Pacifica Found.*, 438 U.S. 726, 750-751 (1978).

In its subsequent decisions, the FCC followed the *Pacifica* holding closely and narrowed its policy of sanctioning indecent broadcasts to only those situations where the expletives were repeatedly uttered. Then, in 2004, the FCC changed its position on "fleeting expletives" after the full Commission overruled all prior decisions that had held "fleeting expletives" as not indecent. *See In re Complaints Against Various Broadcasts Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Or-*

der, 19 F.C.C.R. 4975 (Mar. 18, 2004) [hereinafter *Golden Globe*]. The incident in question involved the musician Bono's use of a variant of the "F-word" during his acceptance speech at the January 19, 2003 Golden Globe Awards. The full Commission held that the use of the "F-word" was patently offensive, and that the fleeting and isolated use of the word was irrelevant, thereby completely disregarding the "fleeting expletive" exemption.

Thereafter, the FCC issued an order in 2006 finding four programs indecent under the Golden Globe standard of indecency: Fox's broadcasts of the 2002 and 2003 Billboard Music Awards, various episodes of ABC's "NYPD Blue," and an incident on CBS's "The Early Show." See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Notice of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (Mar. 15, 2006) [hereinafter *Omnibus Order*]. Here, the FCC reiterated that the offending material need not be repeated in order for it to be found indecent. Although the FCC declined to issue forfeitures because the broadcasts in question occurred before the *Golden Globe* decision, all three networks appealed the decision.

All the appeals were eventually consolidated into the Second Circuit, but before briefs could be filed the FCC requested a voluntary remand to consider the networks' arguments. After taking comments, the FCC's new order still found Fox liable for the incidents occurring during the 2002 and 2003 Billboard Music Awards—the FCC exempted ABC from liability on technical grounds and ruled CBS's violation was in the context of a "bona fide news interview." See *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, Order*, 21 F.C.C.R. 13,299 (Nov. 6, 2006) [hereinafter *Remand Order*]. An automatic appeal followed, resulting in this opinion.

*Discussion:* Fox, CBS, and NBC ("the Networks") raised several arguments against the Remand Order; however, the court only considered the first: whether the policy applied in the Remand Order was an arbitrary and capricious change to the "fleeting expletives" policy because it was a dramatic change in policy without explanation. In assessing the case the court looked to the validity of the "fleeting expletive" policy as a whole rather than the just the specific broadcasts in question, i.e., the policy of the *Golden Globe* decision rather than how it was applied in the *Remand Order*.

Noting their power to set aside an agency's decision as "arbitrary or capricious," the court looked to see if the FCC had provided a reasonable explanation that would justify the drastic change of policy. In so doing, the court found that the FCC had in fact changed its policy on "fleeting expletives" with the *Golden Globe* decision. As a result of the departure from previous policy, the FCC was required to give a reasoned analysis for the change from prior precedent, otherwise its decision would be set aside as arbitrary and capricious. See

*N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985).

In evaluating the FCC's reasons for the policy change, the court confined its analysis to the reasons announced by the FCC. First, the court turned to the FCC's altered "first blow" theory, originally offered by the Supreme Court to justify the FCC's regulation of broadcasts in *Pacifica*. Arguing an expanded view of this theory, the FCC noted that an "automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Remand Order*, 21 F.C.C.R. 13,299, ¶ 25. In rejecting this contention, the Second Circuit noted that the FCC does not explain why there was no "first blow" harm from "fleeting expletives" for the thirty years between *Pacifica* and *Golden Globe*. The court also took issue with the inconsistencies in the FCC policy, which would allow expletives if they were "integral" to a program or if they were part of a "bona fide news interview," but not anywhere else—essentially forcing the public to take a "first blow" in certain contexts, but not in others. Thus, the court found the "first blow" theory failed to offer a reasonable explanation necessary to make such a drastic change in policy.

Next the court briefly considered the other theories offered by the FCC, but found all of them to be insufficient to allow for the drastic change. The court rejected the view that "non-literal" uses of expletives should fall within the definition of indecency, which the FCC defined as words describing a sexual or excretory function or organ, because it lacked common sense. The court noted that most people understand the "non-literal" usage to have no "sexual or excretory" meanings. Likewise, the court rejected the FCC's contention that allowing "fleeting expletives" would cause broadcasters to increase the airing of expletives because they could do so with impunity by airing them one at a time. This rejection was based upon the FCC's own brief, which indicated that broadcasters never filled the airwaves with expletives prior to the *Golden Globe* decision. *See Remand Order*, ¶ 29. Finally, the court rejected the claim that the emphasis of enforcement on the context of the speech was not consistent with the policy of "fleeting expletives." The court reasoned that emphasizing context was inconsistent with the FCC's policy of treating variants of certain expletives as presumptively indecent (essentially, not allowing context to play a role, which was what the FCC was saying made "fleeting expletives" inconsistent). Also, the court stated that the FCC failed to explain why an isolated expletive should now fit under the indecency test. Because the FCC offered no reasonable explanations for the change in policy, the court held that the policy was "arbitrary and capricious" and thus void under the Administrative Procedure Act.

*Dissent:* Justice Leval dissented from the majority opinion, believing that the FCC gave reasonable explanations for their change in policy and that the

court should not impose its own judgment when an agency has given sufficient accounting. While agreeing that the reasons were not compelling, Justice Leval thought the reasons were still enough to satisfy the Supreme Court's requirement of reasonable explanation, and thus should receive deference by the court.

*Summarized by Patrick Dupre*

**Time Warner Telecom, Inc. v. FCC, No. 05-4769, 2007 U.S. App. LEXIS 24,204 (3d Cir. 2007)**

*Issue:* Whether the FCC appropriately classified Digital Subscriber Line ("DSL") as an "information service" rather than a "telecommunications service," thereby exempting DSL service from Title II of the Communications Act of 1934, which requires common carriers to provide unfettered access to competing service providers.

*Holding:* The FCC maintained and exercised the appropriate authority in determining that DSL should be classified as an "information service," and therefore, the companies providing the service are not subject to Title II requirements.

*History:* The Supreme Court considered the ability of the FCC to interpret the definitions of telecommunication and information services in *National Cable & Telecommunication Association v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, the Court held that the FCC appropriately concluded that broadband Internet access provided by cable companies was an "information service," because the classification was based upon the end-users perception of the service as an information service. The Communications Act defines an "information service" as a service that modifies data and information between the creator and the end-user; whereas, the Act defines telecommunication services as a link between two users without any modification of the data. 47 U.S.C. § 153(20) & (46).

In 1971, the FCC implemented the *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* ("Computer I"). 28 F.C.C.2d 267 (1971). *Computer I* required local telephone companies (termed Local Exchange Carriers, "LECs") that sell data services, to form completely separate subsidiaries for data services. Specifically, the companies' roles as telecommunication providers and data service providers should not commingle. *Computer I* also determined there was less need to regulate data service than telecommunication service. These data services continued to develop and expand over the course of the decade.

In 1980, the FCC significantly amended its regulations related to the transmission of data. This section of the code was known as "*Computer II.*" *Com-*

*mission's Rules and Regulations*, 77 F.C.C.2d 384 (1980). This ruling relaxed the data service provider separation requirement and split data transmission into two categories: (1) basic transmission service, consisting of the movement of data in an unaltered form; and (2) enhanced transmission service, consisting of anything more than basic transmission. The FCC further explained enhanced data services as any modification of content or manipulation of information by either the vendor or the user. The categorization of data determined the applicability of Title II. Basic service was subject to Title II, but enhanced service was not. Enhanced services need basic services to function. Providers of basic services were therefore required, as LECs, to provide non-discriminatory access to enhanced service providers. Thus, data transmission became subject to FCC regulation.

Congress amended Title II in the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56. With the goal of enhancing competition, the Act imposed additional duties on LECs, such as prohibiting unreasonably strict resale of their services and permitting competitors to access their rights of way. 47 U.S.C. § 251(b)(1) & (4). The Act also essentially reclassified basic data services and enhanced data services as "telecommunications service" and "information service," respectively. This change had relatively little effect until 2002.

Prodded by technological advancements, the FCC ruled that broadband Internet service provided by a cable company was an "information service" and not subject to Title II regulation. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798 (2002). This ruling was upheld by the Supreme Court in *Brand X*. Shortly thereafter, the FCC, in its *Wireline Broadband Order*, ruled similarly that DSL service was an integrated "information service," rather than an "information and telecommunication service." Therefore, LECs were no longer required to grant non-discriminatory line access to independent Internet service providers ("ISPs").

*Discussion:* Several ISPs challenged the FCC's interpretation of "information service" under the Telecommunications Act. However, the Third Circuit found that *Brand X* controlled.

The petitioners in *Time Warner* argued that the FCC's determination that DSL is an information service was not supported by record evidence, was contrary to the agency's prior rulings and was inconsistent with broadband's treatment under the Communications Assistance for Law Enforcement Act ("CALEA"). The court quickly dismissed these arguments. In considering the lack of record evidence, the court looked to the FCC's *Wireline Broadband Ruling* and noted that the FCC found that end-users view DSL service and cable Internet service as equivalent. The court found this sufficient, especially considering the FCC's previous ruling that the definition of an offering turned

on end-users' perceptions of the service. As for contradictory prior treatment of DSL service by the agency, the court identified that the FCC candidly admitted it had not been completely consistent with its treatment of wireline broadband. Even so, the court deferred to the Supreme Court's *Brand X* ruling, which stated that the initial determination of a definition was not "carved in stone" and can be reevaluated based on technological developments. Thus, inconsistent treatment of the definition alone does not make the interpretation unlawful. Thirdly, the petitioners argued that because the FCC interpreted CALEA to pertain to "pure telecommunications providers," "pure information services" and "hybrid telecommunications-information services," the FCC, arbitrarily and capriciously interpreted "information service" to be mutually exclusive of "telecommunications service." However, the court held that the agency had the right to interpret the two statutes differently as they serve different legislative purposes.

The petitioners also asserted that the elimination of non-discriminatory access to LEC lines under Title II was itself arbitrary and capricious, and furthermore, that such a decision violated requirements of section 214 of the Communications Act and the Due Process Clause of the Constitution. Their first argument centered on the elimination of the *Computer II* requirements, which required that LECs provide non-discriminatory access to competitors. The petitioners contended that before the FCC could eliminate the requirements, the agency must conduct a full market analysis. However, the court held that precedent only requires a "reasoned analysis" especially in light of the rapidly changing market. The FCC provided such a reasoned analysis in the *Wireline Broadband Order* by considering how the broadband market is likely to develop. The court agreed that a forward-looking analysis was appropriate in this situation.

Under the second claim, the petitioners argued that after eliminating *Computer II*, the FCC should have evaluated LEC service under the common carrier test set forth in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir 1976). This test mandates that the agency regulate a carrier as a common carrier if the public interest so requires. Contrary to the claim, the court held that the FCC had evaluated the public interest and had determined that regulation under *Computer II* would harm consumers by impeding development of innovative technologies. The FCC also concluded that independent ISPs would continue to have access to the lines because LECs would be motivated to spread the cost of their network to as many customers as possible. Because the FCC did take the public interest into consideration, the common carrier test was satisfied and FCC decision was neither arbitrary nor capricious.

Finally, the court turned to the alleged violation of section 214 of the Communications Act and the Due Process Clause of the Constitution. Section 214 requires common carriers to obtain a certificate of discontinuance prior to eliminating a service. The FCC, in redefining DSL service, effectively issued a blanket certificate of discontinuance. The petitioners argued that the FCC may not issue a blanket certificate. The court rejected this argument for lack of any supporting precedent. Additionally, the court further dispelled the argument by noting that the only requirement under section 214 is an opportunity to be heard, which the FCC provided through the one-year transition period preserving the right of the agency to take action if necessary to preserve the public interest. Failing to find any violation of section 214 or the Due Process Clause, the court denied the petition for review.

*Summarized by Robert M. Bankey, Jr.*

**Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 127 S. Ct. 1513 (2007)**

*Issue:* (1) Whether the FCC's application of §§ 201(b) and 207, which authorize the FCC to declare any carrier charge, regulation, or practice "unjust or unreasonable," is a reasonable interpretation of the statutes; and (2) whether § 207 authorizes a payphone operator to bring a federal-court lawsuit against a recalcitrant carrier that refuses to pay the compensation that the Commission's order says it owes.

*Holding:* The United States Supreme Court, per Justice Breyer, held that a federal-court cause of action is available to rectify injuries caused by violations of the Communications Act's "just and reasonable" section implemented by FCC regulation. The Court further held that the FCC acted lawfully when it determined that the long distance carrier's failure to pay compensation was either an "unjust or unreasonable" practice within meaning of the Communications Act. Justice Breyer delivered the opinion of the Court, in which Chief Justice Roberts, Justices Stevens, Kennedy, Souter, Ginsburg, and Alito joined. Justices Thomas and Scalia filed separate dissenting opinions.

*History:* A payphone operator sued a long-distance carrier to recover compensation for dial-around coinless calls authorized by the Communications Act and Federal Communications Commission ("FCC") regulations. The United States District Court for the Western District of Washington denied the carrier's motion for judgment on the pleadings, ruling that a private cause of action was available for a long-distance carrier's failure to pay the service provider its dial-around compensation. The United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari and affirmed the decision.

*Discussion:* The FCC regulates interstate telephone communications under a regulatory scheme that is similar to the Interstate Commerce Act, via the Communications Act of 1934, which granted the FCC broad authority to regulate interstate telephone communications. Congress borrowed directly from the Interstate Commerce Act of 1887 when it drafted the Communications Act. In both the Interstate Commerce and Communication Acts, the statutory provisions authorize the Commission to declare any carrier “charge,” “regulation,” or “practice” in connection with the carrier’s services to be “unjust or unreasonable,” thereby authorizing an injured person to recover

Legislation passed by Congress in 1990 to help bolster competition required payphone operators to provide free access to payphone users to connect to the long-distance carrier of their choice. This legislation required payphone operators to allow the user to obtain “free” access to the carrier, i.e. by making a coinless call. Since Congress also recognized that the “free” call would cost the payphone operator, it required the FCC to “prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call.” 47 U.S.C. § 276(b)(1)(A).

At issue in this case is Global Crossing’s failure to pay the payphone operator, Metrophones Telecommunications. The statutory language of sections §201(b) and §207, taken with the history as originally implemented in the Interstate Commerce Act, shows that the purpose of §207 is to allow persons injured by a §201(b) violation to bring a federal-court action. Thus, a violation of a regulation that lawfully implements §201(b) is a violation of the statute. Global Crossing refused to pay a Commission-ordered compensation to Metrophones, even though it had received a benefit from Metrophones. Metrophones allowed coinless calls to be placed through its phones, and Global Crossing benefited from those calls.

The FCC determined, through its regulations, that the cost of such coinless calls should be born in this manner by the long distance provider. This determination by the FCC is within its statutory authority. Global Crossing violated the FCC’s decision that the coinless calls should be made and then compensated for by the long distance carrier. The cause of action was properly brought in federal court.

*Summarized by Leigh Bothe*